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In the Supreme Court of the United States

OCTOBER TERM, 1980

CARL M. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an attorney may refuse to produce documents or testify before a grand jury (a) in reliance on the attorney-client privilege, even where he has made no showing that the specific evidence sought would require the disclosure of confidential communications between himself and any of his clients, or (b) in reliance on the qualified privilege for attorney work product, when he has made no showing that the privilege applies to any particular question or document demand.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-25) is reported at 623 F. 2d 489. The opinions of the district court (Pet. App. 1-5, 6-15) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1980. A petition for rehearing was denied on July 31, 1980 (Pet. App. 26). The petition for a writ of certiorari was filed on September 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After being served with subpoenas to appear and to produce certain documents before a federal grand jury, petitioner moved to quash the subpoenas. The district court ultimately granted petitioner's motion to quash and denied the government's motion for an order to show cause why petitioner should not be held in contempt (Pet. App. 1-15). On the government's appeal, the court of appeals reversed (*id.* at 16-25).

The pertinent facts are set forth in the opinions below. Briefly, they show that in September 1978 a special grand jury was empanelled in the United States District Court for the Northern District of Illinois to investigate possible criminal violations stemming from the burglary of the residence of Anthony J. Accardo, which was followed by the apparent murders of five Chicago area burglars.[1] One of the witnesses was Michael Joseph Volpe, Sr., a handyman who worked at the Accardo home. Shortly after Volpe testified on September 13, 1978, he

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[1] The current extension of the grand jury will run out during the first week of February 1981.

disappeared, and he has been missing since that day. The grand jury subsequently expanded the scope of its investigation to include an inquiry into Volpe's disappearance as a possible obstruction of justice (Pet. App. 16-17).

Petitioner is a Chicago attorney who represented Volpe, Accardo, and members of Accardo's family with respect to their appearances before the grand jury (Pet. App. 6).[2] Because petitioner was one of the last persons known to have seen Volpe before his disappearance, he was subpoenaed in June 1979 to appear and produce documents relating to his representation of Volpe (*id.* at 17). Specifically, the subpoenas required production of accounts receivable relating to Volpe; time records relating to his representation of Volpe; records of the dates, places, and times Volpe met with petitioner or his employees between September 8, 1978, and October 31, 1978; and fee and retainer information (*id.* at 31-32).[3] Petitioner filed a motion to quash the subpoenas, claiming that his appearance before the grand jury would chill his attorney-client relationship with Accardo and his other clients (*id.* at 7).

On July 9, 1979, the district court denied the motion and ordered petitioner to appear on July 11. On that day, petitioner appeared in the witness room but refused to appear before the grand jury. The government sought an order to show cause why petitioner should not be held in contempt of court (Pet. App. 18). At the court's request,

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[2]Accardo was identified as a target of the investigation into events following the burglary.

[3]An earlier subpoena requesting additional information and petitioner's fingerprints, palmprints, and photographs was withdrawn by the government (Pet. App. 17 n. 1).

the government filed a list of proposed questions (*id.* at 27-30) and an in camera affidavit with exhibits. After a hearing the district court ruled that the government had failed to establish either that the information and material sought were not protected by the attorney-client privilege or that the information was both material to the grand jury's investigation and unavailable through other sources. It then concluded that the questions cumulatively violated the attorney-client privilege and that petitioner's appearance before the grand jury might compel him to waive the qualified privilege for attorney work product (*id.* at 4-5). The court then denied the government's show cause motion and quashed the subpoenas (Pet. App. 1-5).

The court of appeals reversed (Pet. App. 16-25). It held that the district court erred in imposing on the government the burden of disproving the availability of the attorney-client privilege and of establishing need. To the contrary, the court held that petitioner is required to appear before the grand jury and that he may assert that privilege only with respect to particular questions that infringe upon it (Pet. App. 20-21). The court further held that the particular areas to which the questions were directed were not protected by the privilege, specifically referring to the questions relating to the client's whereabouts, whether and when communication occurred between client and attorney, receipt of fees, and meetings at which third parties were present or information was received about the client from third parties (*id.* at 22-24).

ARGUMENT

The decision of the court of appeals represents the application of settled law concerning the attorney-client privilege to a case in which a district court has sustained an attorney's blanket claim of the privilege to resist appearing before a grand jury or producing documents

not shown to reflect attorney-client communications. For that reason, and for the additional reason that petitioner's contentions rest ultimately on what he characterizes as (Pet. 6) "the unique factual situation existing in this case," review is unwarranted.

1. Petitioner essentially contends (Pet. 6-16) that whenever an attorney who represents a target under investigation is called to testify before the grand jury, the attorney-client privilege will protect him from being compelled to testify because of the mere possibility that some of the questions asked might touch on privileged matters and because the "attorney-client relationship" (Pet. 7) might be harmed in some way. While petitioner concedes (Pet. 14) that he has "the burden to prove the existence of the privilege," he appears to equate proof of the existence of that privilege with mere proof that an attorney-client relationship exists between the attorney-witness and the target or targets of the investigation. These contentions are premised on a fundamental misconception of the privilege.

Because the attorney-client privilege conflicts with the principle that the public " 'has the right to every man's evidence' " (*Branzburg* v. *Hayes*, 408 U.S. 665, 686 (1972), quoting *United States* v. *Bryan*, 339 U.S. 323, 329, 331 (1950)) and hinders the truth-finding process, it is to be narrowly construed to do no more than is necessary to achieve its essential purposes. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974); *United States* v. *Upjohn Co.*, 600 F. 2d 1223, 1227 (6th Cir. 1979), cert. granted, 445 U.S. 925 (1980).[4]

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[4]Contrary to petitioner's suggestion (Pet. 6), the attorney-client privilege issue before the Court in *Upjohn* has no bearing on the issue in this case. *Upjohn* presents the question whether, in a corporate context, the "control group" test or the "subject matter" test should

As the court below properly recognized (Pet. App. 19), "the attorney-client privilege protects from disclosure confidential communications made by a client to his attorney," in order "to promote free consultation of legal advisors by clients." See *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Clearly the privilege was neither meant to protect every aspect of an attorney's dealings with his client nor to prevent disclosure of all facts known by the attorney about his client. *United States* v. *Pipkins*, 528 F. 2d 559 (5th Cir.), cert. denied, 426 U.S. 952 (1976); *United States* v. *Bartone*, 400 F. 2d 459 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969). Thus, as the court below noted, "the privilege protects confidential communications, not the attorney-client relationship as a whole" (Pet. App. 20); and a witness who wishes to rely on the privilege to avoid responding to a particular question or document demand must prove that the privilege applies in that instance (*id.* at 22); *United States* v. *Hodgson*, 492 F. 2d 1175, 1177 (10th Cir. 1974); *Colton* v. *United States*, 306 F. 2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); 8 *Wigmore on Evidence* § 2322 at 630 n. 2 (McNaughton rev. 1961). See also *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951) (as to privilege against self-incrimination).

Applying these principles, the court of appeals correctly held that petitioner could not rely on the privilege to avoid even appearing before the grand jury[5] and that he

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be applied in determining whether the privilege protects communications between an attorney and employees of the corporation.

[5] *United States* v. *Wolfson*, 558 F. 2d 59 (2d Cir. 1977), upon which petitioner erroneously relies, recognizes that "the Government has the right to call an attorney before the grand jury and question him on unprivileged matters." *Id.* at 65. In the course of the inquiry, if a given question is properly found to intrude on a privilege, the attorney is not obliged to respond, as the court below noted (Pet. App. 25).

was obligated to answer each question unless he could establish that a response would compromise a confidential communication from a particular client.[6]

Petitioner's suggestion (Pet. 13) that the government was wrongfully trying to call him before the grand jury simply to force him to assert the privilege is unfounded. As the court of appeals correctly observed (Pet. App. 22-24), the types of evidence that the government's proposed questions seek to elicit do not appear to come within the privilege. The questions relate primarily to Volpe but in no way require the disclosure of any confidential communication by him to petitioner. Thus, the questions directed at Volpe's physical appearance, clothing, and demeanor before his disappearance address only external characteristics readily observable by anyone; and there is no confidentiality in one's appearance to be protected by the privilege. *United States* v. *Pipkins*, *supra*, 528 F. 2d at 563. Nor is the mere fact of communication itself between the attorney and an acknowledged client protected by the attorney-client privilege. *In re Fischel*, 557 F. 2d 209, 212 (9th Cir. 1977); *United States* v. *Kendrick*, 331 F. 2d 110, 113-114 (4th Cir. 1964); *Colton* v. *United States*, *supra*, 306 F. 2d at 637. Similarly, meetings between the attorney and client at which third parties are present are not privileged. *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 975 (5th Cir. 1975); 8 *Wigmore on Evidence* § 2311 (McNaughton rev. 1961 & Supp. 1980); *In re Terkeltoub*, 256 F. Supp. 683, 684 n.2 (S.D.N.Y. 1966). Finally,

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[6]Contrary to petitioner's claim (Pet. 13), the court of appeals does not require that the privilege must invariably be invoked in the presence of the grand jury. Rather, the court recognized (Pet. App. 22 n.5) that the procedures for asserting the privilege may include an in camera proceeding if explaining the basis for the privilege might reveal confidential information.

ledgers and information relating to the payment of fees are not covered by the privilege. *In re January 1976 Grand Jury (Genson)*, 534 F. 2d 719, 728 (7th Cir. 1976); *United States* v. *Hodgson*, *supra*, 492 F. 2d at 1177. In short, none of the evidence sought by the grand jury involves the kind of information that the attorney-client privilege is designed to protect; but in any event, nothing in the opinion of the court of appeals forecloses petitioner from invoking the privilege as to any particular question to which his response would disclose a confidential client communication.[7]

2. In the court of appeals petitioner relied fundamentally on the attorney-client privilege,[8] and the opinion of the court of appeals accordingly speaks to that issue. Since nothing in the opinion forecloses petitioner from relying on the qualified privilege for attorney work product if it applies to any particular question or document demand, the work product privilege cases on which he relies (*United States* v. *Upjohn Co.*, *supra*; *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F. 2d 933

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[7] The court of appeals would permit petitioner to claim the privilege even as to normally nonprivileged matters if he can show "a strong probability that disclosure of information would implicate the client in the very criminal activity for which legal advice was sought" (Pet. App. 23); but the court properly recognized that disclosure would be required where the advice was sought "in order to promote intended or continuing criminal activity" (*id.* at 24). *Clark* v. *United States*, 289 U.S. 1, 15 (1933).

[8] Petitioner asserted at the close of his brief in the court of appeals that the information sought by the government was protected by, *inter alia*, the "work product doctrine" (Br. 27). But his issue statements made no reference to that doctrine (*id.* at 1); his citation of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), and other attorney work product cases was made only in the course of his discussion of the attorney-client privilege (Br. 24); and he nowhere explained why any of the specific information sought should be deemed privileged under the work product doctrine.

(6th Cir. 1980); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa. 1976); *In re Terkeltoub*, *supra*) are simply inapposite.

In any event, the work product privilege, which protects work done by an attorney in anticipation of litigation (see *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947)), has no readily apparent application to bills, retainer agreements, or the other sorts of information sought by the grand jury in this case. Moreover, any such privilege could be overcome by a showing of the grand jury's need for the information. *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511-512. Here, the need for information bearing on the mysterious disappearance of a key witness seems obvious.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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